IN THE COURT OF APPEALS OF IOWA

No. 8-739 / 98-0933

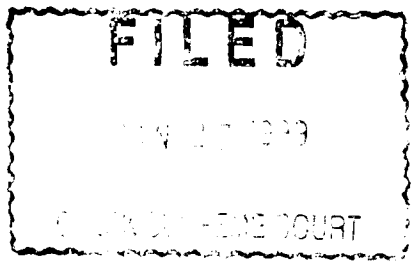
IN RE THE MARRIAGE OF OWEN MICHAEL McCARRON AND POLLY JEAN McCARRON

Upon the Petition of
OWEN MICHAEL McCARRON,

Petitioner-Appellee/Cross-Appellant,

And Concerning
POLLY JEAN McCARRON,

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Respondent appeals, and petitioner cross-appeals, from various economic and child custody provisions of their dissolution decree. **APPEAL AFFIRMED AS MODIFIED; CROSS-APPEAL AFFIRMED.**

Sharon A. Mellon of Mellon & Spies, Iowa City, for appellant.

Randall B. Willman of Leff, Haupert, Traw & Willman, L.L.P., Iowa City, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

SACKETT, C.J.

Respondent-appellant Polly Jean McCarron appeals challenging the economic provisions of the decree dissolving her nearly fourteen-year marriage to petitioner-appellee/cross-appellant Owen Michael McCarron. Owen on cross-appeal contends he, not Polly, should have been awarded physical care. He also challenges the economic provisions. We affirm as modified on the appeal, and affirm on the cross-appeal.

Owen and Polly were married in 1984. At the time of marriage, Owen held a bachelor's degree and a master's degree and was employed by Boeing in Seattle, Washington. Polly, who had attended college for two years, worked in her father's insurance business. She worked full-time until one year after the birth of their first child, Sean, born in August of 1986. The parties have a second child, Kyle, born in February of 1988. Polly returned to full-time, outside-the-home employment in the Spring of 1988.

In the Fall of 1989, Owen became a full-time medical student at the University of Washington. During the course of Owen's medical education, Polly's grandmother and parents gave the couple more than $110,000. Owen's parents contributed $10,000. Owen took out $90,000 in student loans. While Owen was in medical school, Polly was employed outside the home earning $12,000 to $15,000 a year. Owen graduated from medical school in 1993 and took a residency at the University of Iowa in obstetrics and gynecology. The parties separated in the Spring of 1995

after Owen moved from the family home. Polly, who went to school part-time, obtained a bachelor's degree in history in the Spring of 1996.

At the time of the dissolution, Owen was thirty-nine years old and was employed by an obstetrics practice in Cedars Rapids, Iowa, at an annual salary of $200,000. Polly, who was thirty-seven, was employed as a preschool teacher earning less than $200 a month.

The parties agreed they would receive joint custody of their two sons. They also stipulated as to a division of their assets. They could not decide (1) who should be the primary physical custodian, (2) how much should be paid in child support, (3) what Polly should be awarded in alimony, and (3) what Polly should receive for attorney fees. These issues were submitted to the district court.

The district court named Polly as the primary physical care parent. The district court conditioned the award by providing Polly could not leave the State of Iowa without prior court approval. Owen was ordered to pay child support of $2000 a month. The district court ordered Owen pay Polly rehabilitative alimony of $400 a month for thirty-six months. Owen was also ordered to pay $7000 toward Polly's trial attorney fees.

We first address Owen's contention he was the better parent to be awarded physical care. We review de novo. *In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's factual findings, we give them weight in considering the credibility of witnesses. *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa App. 1991). The controlling consideration in determining

custody is the interest of the children. Iowa R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. *See In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one party as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the children. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985).

We give consideration to a parent's role in child raising prior to a separation in fixing physical care. *See In re Marriage of Volding*, 544 N.W.2d 457, 459 (Iowa App. 1995); *In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa App. 1991) (physical care awarded to father affirmed despite mother's role as primary caretaker); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa App. 1988) (custody of a child who had been in mother's primary care for most of life awarded to father).

The district court was asked to choose the primary care parent. The district court found both to be loving and caring parents concerned about their children and their well being. Our review of the record causes us to agree with these findings. The district court determined Polly had been the primary care parent. Owen recognized this in his brief. We agree with this conclusion. The district court also found the family had been primarily supported by Owen. The district court found Owen exhibited greater stability. The district court noted Polly had been inconsistent in her plans. The district court also noted Polly had elected to move into the home of her male companion.

Our review of the record convinces us Polly has been the continuing stable influence in the children's lives. The children seem well-adjusted. We find no reason to disagree with the district court's award of primary care and affirm.

Polly initially complained about the provision made by the district court she stay in Iowa. Historically, Iowa courts have not changed custody on the basis of a parent's move from the area where both parties reside absent other circumstances. *See In re Marriage of Vrban*, 359 N.W.2d 420, 425-26 (Iowa 1984); *In re Marriage of Frederici*, 338 N.W.2d 156, 161 (Iowa 1983). These cases predate legislative changes providing if a parent is to relocate the residence of a minor child to a location one hundred fifty miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in circumstances. *See* Iowa Code § 598.21(8A) (Supp. 1997). This legislative change is compatible with other legislative changes in the past decade focusing on the

opportunity for substantial parental involvement in a child's life by both parents even when there has been a marriage dissolution. *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa App. 1998).

We need not address Polly's challenge to the district court's restriction on her leaving the state as she and Owen have agreed they each will give the other a ninety-day notice should either elect to leave the State of Iowa. We modify the decree accordingly.

Polly contends she should have additional alimony. The district court awarded her $400 a month for thirty-six months as rehabilitative alimony. She points to the testimony of her expert, who she contends says she should have substantially more.

When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party and (2) their present standards of living and ability to pay balanced against their relative needs. *See In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983).

The district court gave little credence to the expert's opinion finding, among other things, the expert recognized if the future earning estimate was wrong his

calculations would be erroneous. We consider the expert's testimony, but the issue before us is not to arrive at a dollar figure using a series of projected incomes. The economic provisions of a dissolution decree are based on a number of factors, including the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed in the marriage. *See In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Versluis*, 521 N.W.2d 760, 761-62 (Iowa App. 1994).

Education obtained during a marriage that will enhance future earnings is a proper factor to consider in assessing the equity of the economic provisions of a dissolution decree. *See In re Marriage of Francis*, 442 N.W.2d 59, 61 (Iowa 1989); *In re Marriage of Janssen*, 348 N.W.2d 251, 253 (Iowa 1984); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978); *Estlund*, 344 N.W.2d at 280. Yet, the income will be generated by work performed after the dissolution is finalized. As we said in *In re Marriage of Mouw*, 561 N.W.2d 100 (Iowa App. 1997), "This is not so much a computation of dollars and cents as a balancing of equities." *Id.* at 102.

Owen on cross-appeal advances the alimony award is too much and points to Polly's relationship with her boyfriend, who works in research in a biochemistry lab at the University of Iowa and earns just less than $25,000 a year. Polly contends this argument is misplaced because her boyfriend does not have the ability to support her.

The assets were divided by stipulation; Owen and Polly each received a vehicle. The only asset of any value was their home which had been sold and was

divided by the stipulation with each party receiving between $21,000 and $22,000. Owen assumed debts in excess of $100,000, the majority of which were loans for his education.

The respective pursuits of education saw the parties accumulating little in the way of assets during the marriage. While Polly leaves with modest assets, Owen leaves with more than $100,000 in debts. The education Owen acquired during marriage provides him with better long-term opportunities for financial success than Polly has with a history degree.

Focusing on, among other things, the sacrifices Polly made to assist Owen with his education and considering also the financial contribution Polly's family made, we consider the financial provisions made for Polly in the decree inadequate. While the better plan is to settle the inequities through a division of assets, such a course is not available. There have been few assets accumulated. Consequently, we modify the decree to provide Polly shall receive reimbursement alimony of $800 a month for twelve years in addition to the award of rehabilitative alimony.

The district court ordered Owen to purchase life insurance in the amount of $200,000 naming the children as beneficiaries until they are eighteen years old. Polly contends the district court should have ordered Owen to purchase life insurance of $500,000 naming the children beneficiaries until they are eighteen years old.

Life insurance, when awarded, should be limited to the amount necessary to secure an obligation. *See In re Marriage of Lytle*, 475 N.W.2d 11, 12 (Iowa App. 1991). We find the life insurance amount sufficient and affirm on this issue.

Polly requests nearly $18,000 in appellate attorney fees. We award her $8000. Costs on appeal are taxed to Owen.

APPEAL AFFIRMED AS MODIFIED; CROSS-APPEAL AFFIRMED.